U. S. Court of Appeal for the Third Circuit
July 5, 2005
Petitioner's June 20, 2005
Petition for Rehearing *'en banc'*
denied *'sua sponte'*.
June 6, 2005 Order– Certified July 13, 2005
Affirming November 2, 2005 order
Denying Reconsideration of district court's
'sua sponte' dismissal, with prejudice, of
Petitioner's suit for Declaratory Judgment,
October 20, 2005 Order not considered.

Petitioner's ERISA action was filed in federal court October 15, 2004 and *sua sponte* dismissed, with prejudice on October 20, 2005 by order of the district court. Reconsideration denied *sua sponte* November 2, 2005 and both orders appealed.

The district court's *sua sponte* orders are subject to differing standards of appellate review, as Dismiss is Plenary-Reconsider is abuse of discretion.

Appeal Court Order captions list Appellee identity errors made by the district court, corrected in paragraph 4, Plaintiff's Petition for Reconsideration.

The word "Appellee" is absent on the orders.

Petition for Rehearing *en banc* incorrectly printed as:
SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

Appeal Court's July 5, 2005 order is confusing:

"The petition for rehearing *en banc*" filed by Appellant having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges in active service, and majority of the circuit judges of the circuit in regular active service not having voted for rehearing by court *en banc*, petition for rehearing *en banc* is denied."

Factual Summary

Bosicks married 04/06/74
Mary Ellen Chajkowski filed for divorce 07/02/97
Joseph Bosick granted *Bifurcation* Order 12/30/00

All economic claims were litigated in the Pennsylvania courts, including APL/child support. Petitioner believes there would have been no A~L award, thus no inequitable income tax burden, if the state courts had compelled timely *plan* disclosures and made timely distribution of assets.

Respondent/Bosick, self-employed lawyer and *plan* trustee, controlled all retirement and deferred income assets; Petitioner, elementary teacher 72-77, quit teaching to raise the parties' three children and was not employed outside home.

Pennsylvania courts excluded as 'mandatory' 401k contributions; rendered an unallocated support order taxable to Petitioner, failed to enforce its unallocated APL/support order 1998-2002, found Respondent/Bosick in contempt but failed to purge, denied petitions to modify support and retroactively modified APL/child support in 2002, adverse to Petitioner who paid income tax on the amount received 1998-2002. In November 2004, a hearing officer issued an order that Petitioner owes Bosick over $100, 519 in APL/child support over-payment, due to April 10, 2002 retroactive order to recalculate.

Pennsylvania appellate courts denied Petitioner's 2003 Petition to Supplement the record with evidence of undisclosed assets discovered after trial; yet inequitably granted Respondent's Petition to Supplement the record with evidence that real estate was sold for a higher price than its 1999 appraisal.

Pennsylvania appellate courts denied appeals by Petitioner that trial court orders are unsupported by substantial record evidence; issued contrary to record

evidence; erroneously excluded 401k contributions; and failed to award reasonable attorney fees.

The April 10, 2002 order awarding Petitioner $474,000 plan assets rests on a "counsel stipulation" valuing the *plan* assets admitted at trial April 4, 2001, without *plan* verification. Petitioner litigated based on limited *plan* knowledge and reposed her trust in counsel 1997-2002. The court permitted counsel to withdraw after 2001 stipulation and 2002 refusal to draft Petitioner's QDRO. Petitioner met with numerous attorneys who refused to represent her. Petitioner's second counsel advised her to accept the 2003 QDRO, then quit prior to 2003 appeal.

By a 2003 QDRO, qualified by the *plan*, Petitioner received over $100,000 less than the 2002 amount ordered April 10, 2002 by ED Order. Further, a share of Petitioner's *plan* assets were "frozen" by the order and remain in Respondents' control. Petitioner made written requests and court petitions for copies of *plan* statements. Fiduciary and judicial respondents failed to comply with or to enforce Petitioner's requests for *plan* statements.

Petitioner/*alternate payee's* undisputed allegations:

- Respondent/*Pennsylvania judges* failed to enforce discovery and rules on asset disclosure or to issue orders granting Petitioner/*alternate payee*'s motions to compel disclosure; as a result, federal statutory rights and responsibilities of the parties were abridged, in violation of the 14th Amendment.

-Respondent/*Self-employed plan participant, law firm plans and plan trustees* failed a fiduciary duty to make timely or supplemented *plan* disclosures to Petitioner/*alternate payee* in litigation 1997-2005.

-Respondent/*Self-employed plan participant, law firm plans and plan trustees* failed to make timely or supplemented ERISA *plan* disclosures to the court pursuant to a child support subpoena, a breach of fiduciary duty in

violation of state and federal law, including the14th Amendment.

-Respondent/*Pennsylvania judges* denied Petitioner/*alternate payee's* Motions/Appeals to purge Respondent/*Self-employed plan participant's* contempt, to compel discovery, including ERISA disclosures, and to modify the unallocated APL/child support orders to include all 401k contributions and tax obligations of the parties.

-Respondents/*Plan trustees,* their wives and Petitioner guaranteed *law firm* 1987 line of credit.

-Petitioner believes Respondent acted in bad faith to conceal significant *Plan* changes without notice.

-*Employer 401k* contributions were never included.

-Petitioner's 1997 equitable distribution claims were not heard at a meaningful time and manner, by an impartial tribunal, a due process violation.

-14th amendment violations unjustly deprived Petitioner of property; and enriched Respondents.

-Respondent/*Pennsylvania judges* reserved ERISA jurisdiction and granted Petition to *Bifurcate* the divorce from the economic claims, advanced by Respondent/*Self-employed plan participant-trustee* and ordered him to file an interim QDRO, which was never filed or enforced.

-Respondent/*Pennsylvania judges* entered a 2002 order based on a 2001 unsubstantiated lump sum "counsel stipulation", to distribute more than twenty years of pension/deferred income claims between the parties by 2003 QDRO at a loss of over $100,000.00.

- Respondent/*Pennsylvania judges* suspended APL as an unprecedented sanction for appealing the order.

-Respondent/*Pennsylvania judges* denied Petitioner's Petition to Supplement the record with evidence of undisclosed assets.

ARGUMENT SUMMARY

Respondent/*Pennsylvania judges* made inequitable, arbitrary and capricious applications of law, in violation of the Fourteenth Amendment. Inequitable treatment of the parties and failure to remedy errors on appeal constitute *bias* or error, which occasioned economic losses to Petitioner in favor of Respondent. Failure to exercise jurisdiction to enforce ERISA for *alternate payee* is *bias* or error.

Petitioner/*alternate payee* filed a *Pro se* ERISA claim against Respondents/*Self-employed plan participant, law firm plans, plan trustees and Pennsylvania judges* seeking a Declaratory Judgment, an order to compel ERISA disclosure, attorney fees, costs, sanctions, *per diem* statutory penalties and equitable relief. ERISA 'protected class' Petitioner alleges sufficient record evidence of fiduciary conflict and judicial *bias* to warrant a heightened standard of review. Pinto v. Reliance Standard Life Ins. Co., 214 F3d 377 (3d Cir. 2000). *Plan* assets at issue here include insurance, securities, trusts, real estate and corporate interests, all subject to statutory disclosure requirements in litigation.

Plan Respondents' undisputed breach of fiduciary duty and failure to fully comply with the laws governing discovery, asset disclosure and evidence occasioned unjust economic loss to Petitioner and enrichment to Respondents, in violation civil rules, ERISA, child support, divorce code and tax code statutes. The state and federal courts' undisputed failure to enforce the same constituted a violation of the 14th Amendment.

If district courts have no jurisdiction to enforce undisputed allegations that fiduciary and judicial Respondents' breached statutory duties in violation of the 14th Amendment; then, Declaratory Judgment where jurisdiction lies was warranted here, not dismissal.

The lower courts required no litigant disclosure; screened no conflicts; and issued no Declaratory Judgment,

favorable or adverse. Rules intended to screen conflicts protect the integrity of the courts, litigant due process, and the interests of the public. Disclosure is a Notice requirement at the outset of litigation, to ensure a fair and impartial tribunal, encompassing courts and counsel alike.

Fiduciary and judicial respondents' undisputed failure to comply with ERISA or to enforce timely disclosure interfered with Petitioner*'s* right to claim an equitable interest in marital assets accrued over more than two decades.

Undisclosed conflict may have compromised *alternate payee's* right to be heard at a meaningful time, a meaningful manner, before fair and impartial tribunals, where lower federal courts failed to enforce litigant disclosure rules and screened no conflicts.

Petitioner/*alternate payee's* litigation may have been burdened by undisclosed conflicts of interest in state courts, where litigant disclosures are not required to screen conflicts between attorneys and judges at the outset of litigation.

The counsel stipulation, p. 23 of Appendix I, indicates that counsel for the parties in divorce are members of P.C. law firms. The trial court admitted and relied upon the unverified *plan* evidence submitted on the first day of trial, not in a pre-trial statement, sealed the record and permitted Petitioner's counsel to withdraw appearance after refusing to draft a QDRO based on the averments made by stipulation.

Trial counsel and Respondents failed to incorporate Petitioner/*alternate payee's* testimonial evidence of loans made against interests in American Bar Association Members Retirement Programs. The fact that *plan* loans were available to Bosick to pay child support arrears 1998-2002 was known to the *plan trustees,* to counsel and to judicial Respondents, in their capacity as officers of the court. Fiduciary *plan* Respondents' never disclosed *plan* information regarding *alternate payee's* equitable interest in the American Bar Association Members Retirement Program and successor *plans,* which judicial respondents failed to enforce.

Fiduciary and judicial Respondents must be charged with actual and constructive notice of the parties' ERISA rights and responsibilities *ab initio* and payment of *per diem* penalties and sanctions, as Petitioner had no control over the prolonged lapses between Petitioner's timely filed appeals and state court decisions and orders.

The state courts' failure to enforce ERISA and child support disclosures constituted violations within the jurisdiction of federal district courts. Exclusion of 401k contributions from child support orders is a facial error on the record, which state appellate courts failed to correct. Therefore, failure to purge APL/child support arrears 1998-2002 and Ordering retroactive APL modification adverse to Petitioner was a capricious abuse of discretion.

While state and federal courts may have "concurrent jurisdiction" over ERISA claims litigated in divorce, Petitioner's undisputed allegation that the state courts failed to enforce the parties' ERISA rights and responsibilities constituted a violation of the Act. Suits for violation of federal statutes can be brought in any district court of the United States having jurisdiction over the parties.

The appeal court specifically acknowledged that Petitioner/*alternate payee* was represented by counsel at all times and, in *bias* or error, applied the *Rooker-Feldman* waiver of jurisdiction, a decision inconsistent with Moore, and contrary to the Exxon limitations of the doctrine.

Plenary appellate review of the record would show that the issues pled in the Complaint were not correctly decided as a matter of law, as no disclosures were enforced; no Answer, no Motion to Dismiss, no Judicial Brief were filed by Respondents; and the Complaint allegations were not construed in favor of Petitioner. The district court's *sua sponte* dismissal with prejudice is a reversible legal error.

"In the procedural context of a Motion to Dismiss, we accept the factual allegations contained in the Amendment Complaint as true and plaintiff receives the benefit of all reasonable inferences to be drawn therefrom. *See* Angelastro

v. Prudential-Bache, 764 F.2d 939, 944 (3d Cir.), cert. denied, 474 U.S. 935, (1985). We may not affirm the dismissal of the complaint unless plaintiffs can prove no set of facts that would entitle them to relief. City of Philadelphia v. Lead Industries Assn., Inc., Nos. 92-1419, 92-1420, 92-1463, (3d Cir. 1993), *citing* Conley v. Gibson, 355 U.S. 41, 45-46, (1957). Respondents filed no denials of complaint allegations and no objection to dismissal. The district court failed to address Petitioner's undisputed record losses of over $100,000.00 on Reconsideration, which constituted an 'arbitrary and capricious' abuse of discretion and a violation of the 14th Amendment.

"Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty or property." U.S.C.A. Const. Amend. 14. Carey v. Piphus, 435 U.S. 247 (1978) *citing* Boddie v. Connecticut, 401 U.S. 371, 375 (1971). "The right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable without proof of actual injury." Id. State and federal courts' failure to enforce ERISA occasioned economic losses to Petitioner/*alternate payee*.

Appellate construction adverse to Petitioner, acknowledging material omissions of counsel in state courts yet applying *Rooker-Feldman*, knowingly affirmed judicial error without due process, and constituted an inequitable exercise of jurisdiction inconsistent with United States v. Moore, No. 03-2698, Middle District (3d Cir. 2004), where "fundamental unfairness" supported by FRE 404(b) "plain error" evidence was reversed and remanded.

Exxon Mobil Corp. v. Saudi Basic Industries Corp. 125 S. Ct. 1517, 1521-22 (2005), is controlling authority, defining limits to application of *Rooker-Feldman* doctrine.

ARGUMENT

I. The Court of Appeals, in *bias* or error, applied *Rooker-Feldman* to affirm a *sua sponte* dismissal of undisputed allegations that fiduciary and judicial failure to comply with or to enforce ERISA caused losses to Petitioner/*alternate payee,* contrary to limitations of the doctrine set forth by this court and *bias* inconsistent with third circuit decisions.

a) Limitations of Jurisdictional Waiver

Under the *Rooker-Feldman* doctrine, federal district courts may not hear cases that are meant solely as a collateral attack of fully litigated state court judgments. However, federal jurisdiction over an action does not terminate automatically upon entry of judgment in the state court. Instead, if a party presents in federal court an independent claim, even though it may deny a legal conclusion a state court has reached in a previous action to which that party was also a party, then there is jurisdiction, and state law determines how preclusion would apply. Exxon Mobil Corp. v. Saudi Basic Industries Corp, 125 S. Ct. 1517, 1521(2005).

The United States Court of Appeals for the Third Circuit failed to incorporate important aspects of this Court's decision in Exxon Mobil. They addressed the part of the Court's Opinion upholding *Rooker-Feldman,* but ignored the limitation of the doctrine.

Although this action followed the state divorce action and raised a facet addressed in the state court litigation, this case presents an independent federal question under ERISA: the duty to disclose ERISA assets to a former spouse, and the state judicial system's duty to enforce Petitioner's rights under ERISA and under the Constitution. Petitioner's federal claim is not an "insurance policy," as the *Rooker-Feldman*

doctrine was enunciated to curtail; rather, it is Petitioner's statutory means of exercising her right to *plan* information in Respondents control, pursuant to the civil enforcement provision of ERISA, which the state courts declined to do. Moreover, the federal action involves additional parties and actions by judicial Respondents that constitute a systematic denial of Petitioner's federal and constitutional rights, which make this claim distinct from the state action that preceded it.

b) Inconsistent *bias* in application of the law.

The lower courts exhibited *bias* by inequitably failing to construe undisputed factual allegations in Petitioner's favor and by entering *sua sponte* orders to bar Petitioner's suit for a Declaratory Judgment, knowing that state courts failed to enforce Petitioner's rights under ERISA.

Petitioner's filed suit for Declaratory Judgment to enforce an ERISA claim, in her capacity as a 'protected person' under the statute, yet the lower courts failed to apply a *strict scrutiny* standard of review.

Petitioner alleged sufficient record evidence of fiduciary conflict and judicial *bias* to warrant a heightened standard of review. Pinto v. Reliance Standard Life Ins. Co., 214 F3d 377 (3d Cir. 2000), which the federal courts ignored.

The appeal court's decision to affirm a *sua sponte* application of *Rooker-Feldman* doctrine to bar Petitioner's undisputed ERISA claim is inconsistent with its decision in Parkview Associates v. City of Lebanon, D.C. No. 98 cv 455 (3d Cir. 2000), where the appeal court applied federal jurisdiction, over objection, to hear a developer's claims not raised in prior zoning litigation. The parties in Parkview were not a protected class and the Appellant's issues did not involve a bundle of statutory rights, as in the instant action.

In United States v. Moore, M.D. No. 03-2698 (3d Cir. 2004), an appeal court decision "intertwined with a state judgment" the court intervened where the defendant's counsel did not and the trial court was silent. To correct a

finding of "fundamental unfairness" the court applied the 'plain error' federal rule of evidence 404(b) to rein in state action construed to be "highly prejudicial" to a criminal defendant at the sentencing stage, reversing a jury conviction. Here, the court acknowledged the failure of counsel, yet, Appellant, a protected class member in an action involving a bundle of statutory rights and responsibilities, was subject to disparate treatment. In *bias* or error, the appeal court here elected to apply the *Rooker-Feldman* doctrine to waive jurisdiction.

Rules of procedure and evidence must be neutrally applied to civil litigants, where judicial enforcement of federal law incorporates a bundle of statutory rights and responsibilities between parties that are subject to civil penalty and sanctions. Petitioner here was prejudiced by undisputed state court errors, *inter alia,* including:

- finding Bosick $49,935 in arrears (01/04/99) and assessing **$0.00** monthly payment on arrears;
- stating that medical benefits were not considered;
- excluding 401k contributions;
- retroactively modifying APL/child support;
- admitting and relying on *hearsay* evidence
- unverified by the *plan,* on the first day of trial;
- failure to permit Petitioner to supplement
- evidence of undisclosed assets in 2003;
- failure to compel requests for *plan* statements;
- entering a QDRO on **vested** *plan* assets only;
- freezing *plan* assets in Respondents' control;
- allocating an unnamed **remainder** to Respondent in the equitable distribution order;
- failure to enforce the law or the *Bifurcation* order.

The United States Court of Appeals for the Third Circuit did no plenary review to determine whether the District Court had correctly applied governing federal law. Petitioner's federal action should not have been barred.

II. The district courts have jurisdiction to hear a suit for Declaratory Judgment to enforce ERISA component of a divorce action where a *bifurcation* order reserved jurisdiction over Petitioner's statutory rights, which state courts failed to enforce.

A. Petitioner's Federal Question should not have been precluded.

In a federal action following a state court action, the state court judgment is not given preclusive effect when the party against whom the decision is rendered did not have a full and fair opportunity to litigate the claim or issue in state court. Haring v. Prosise, 462 U.S. 306 (1983).

While Petitioner raised the issue of Respondent's pension assets in seeking equitable distribution during Petitioner's 1997 divorce action, the state court granted Bosick's 2000 petition to *bifurcate* the economic claims and issued an order requiring Bosick to enter an interim qualified domestic relations order incorporating Petitioner/*alternate payee*'s right to Bosick's pension assets. Bosick never entered an interim QDRO; moreover, the trial court never enforced its *bifurcation* order.

The state appellate courts did not enforce the *bifurcation* order. The state courts inequitably denied Petitioner's appeal to supplement record evidence of undisclosed assets in Respondent's control, discovered after trial; and granted Respondent's petition to supplement record evidence that a property sold for more than its stale appraisal.

Petitioner's federal action arose out of the prolonged withholding of information by Bosick and his firm, and lack of enforcement by the state courts. Petitioner is entitled to this information under the Employee Retirement Income Security Act. The failure of Respondents to perform their respective duties under ERISA caused Petitioner to be inequitably denied proper equitable distribution of marital

assets, including Respondent Bosick's pension assets under his firm's Salary Reduction pension *plans*. It also precipitated this suit for Declaratory Judgment.

Respondents' violations of Petitioner's federal rights were never addressed by the state action; where Petitioner's ERISA rights were ostensibly preserved by the trial court's *bifurcation* order directing Bosick to enter an interim qualified domestic relations order and never implemented or enforced by Respondents/*Pennsylvania judges*.

Petitioner's federal suit arose out of distinct circumstances from those determined during Petitioner and Bosick's divorce action. The parties are distinct. The issues are distinct in that the federal action involves federally protected rights, while the state action issues involved the distribution of marital property. The federal action issues included breach of fiduciary duty, due process and judicial enforcement of spousal rights at the dissolution of the marriage under ERISA.

B. Petitioner's Claim is appropriate for declaratory relief.

A case is ripe for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. s2201 where "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Lake Carriers Assn. v. MacMullan, 406 U.S. 498, 506, 32 L.Ed. 2d 257, 92 S.Ct. 1749 (1972) *quoting* Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 85 L.Ed. 826, 61 S.Ct. 510 (1941).

Petitioner's suit invokes judicial enforcement of the parties' rights and responsibilities defined by ERISA:

The state courts' failure to enforce Petitioner's statutory right to Respondents' full disclosure of assets, including retirement and deferred income *plan* assets, pursuant to orders for equitable distribution of assets, constituted ERISA and 14th Amendment violations, within federal jurisdiction.

State and federal courts' "concurrent jurisdiction" over ERISA claims, litigated in divorce, must be construed in light of Petitioner's undisputed allegation that the state courts failure to enforce the parties' rights and responsibilities constituted a violation of ERISA. The congressional purpose of the civil enforcement provision was to encourage judicial enforcement of ERISA. Suits for violation of federal statutes can be brought in any district court of the United States having jurisdiction over the parties. United Automobile v. Textron, D.C. Civ. No. 95-cv-01918 (3d Cir. 1997). Here, the court entered no Declaratory Judgment, favorable or adverse. ERISA rights and responsibilities regarding *plan* disclosures to a *plan beneficiary* are a routine compliance issue; as exercising one's right to *plan* disclosures is not statutorily limited to divorce proceedings, nor is Petitioner's ERISA right to request *plan* disclosure limited to litigation.

Respondents/*Plan participant and law firm plans* enjoyed decades of tax deferred growth and IRS tax returns reported separately from joint returns, outside the knowledge and control of Petitioner, whose losses, over $100,000.00, controlled by Respondent/ *plan participant, law firm plans and plan trustees* are unsupported by evidence of any kind.

ERISA non-compliance penalties are statutory and sanctions are within the discretion of courts exercising jurisdiction. Therefore, Declaratory Judgment is the least restrictive and most efficient way to exercise jurisdiction to redress Respondent(s) ERISA violations, including the state courts failure to enforce the rights and responsibilities of parties litigating equitable distribution of *plan* assets.

III. The lower federal courts inequitably violated Petitioner's due process right to ERISA enforcement.

Under the Fourteenth Amendment, due process mandates that once a state has created rights or benefits, these benefits may not be stripped away without due process of law. Fuentes v. Shevin, 407 U.S. 67, 81 (1972).

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. Id.

Since its inception, this case and the prior divorce action have been riddled with unfair and inequitable exercise of judicial authority over Petitioner's claims.

Petitioner has been denied her rights at every stage of this litigation as well as during the prior state action. Particularly, Petitioner has not received due process of law when the courts performed four actions:

a) Failed to enforce litigant disclosures under the Federal Rules of Civil Procedure.

Petitioner reasonably believes that failure to compel litigant disclosures compromises the court's neutrality where conflicts have not been screened. This is especially true

where Petitioner has experienced systematic prejudicial treatment by the courts.

This United States Court of Appeals failed to fully consider and incorporate "limitations" of the *Rooker-Feldman* doctrine Exxon Mobil Corp. v. Saudi Basic Industries Corp, 125 S. Ct. 1517, 1521-22 (2005), it violated Petitioner/*alternate payee*'s right to due process on undisputed Complaint allegations that fiduciary respondents failed to comply with statutory law and judicial respondents failed to enforce statutory law, a 14th Amendment violation.

This appeal court's application of *Rooker-Feldman* doctrine to dismiss an ERISA suit for Declaratory Judgment was inconsistent with its decision in Parkview Associates v. City of Lebanon, D.C. No. 98 cv 00455 (3d Cir. 2000), where it applied federal jurisdiction to hear a developer's claims not raised under state zoning jurisdiction, where this appeal court chose not to apply *Rooker-Feldman* waiver of jurisdiction.

The lower federal courts erred by dismissing Petitioner's undisputed allegations that state courts failed to equitably enforce due process and full disclosure in 1997 divorce litigation, where it is undisputed that state courts:

1) Failed to enforce a 2000 *Bifurcation* Order;

2) Accepted an unverified 2001 "counsel stipulation" as trial evidence valuing more than twenty years of retirement and undistributed income assets within the custody and control of Respondents;

3) Waited one full year to rule in 2002 on the "Counsel Stipulation" evidence;

4) Issued a 2003 QDRO in substantive and facial error, where it accepted unsupported losses in valuation and granted Respondent's petition to

freeze $24,239.00 and $44,457.00 amounts of Petitioner's share, which remain in his control.

5) Retroactively modified, 1998-2002, the unallocated APL/ child support order adverse to Petitioner, whose income tax obligation was assessed and paid on the full amount received.

6) Suspended Petitioner's APL as a sanction for appealing the equitable distribution order.

The appeal court's application of *Rooker-Feldman* doctrine to this set of facts is contrary to its decision in United States of America v. Moore, No. 03-2698, Middle District (3d Cir. 2004), where the appeal court intervened in the interest of "fundamental fairness" finding that a criminal conviction rested on "plain error" evidence, in violation of FRE 404(b), and reversed and remanded at the sentencing stage based on statements of the prosecutor, where defense counsel and the court failed to intervene. Civil enforcement of federal statutes and due process are at issue here, where the state courts failed to exercise "concurrent jurisdiction" over the federal claims, in violation of the 14th Amendment.

The trial court granted Respondent(s), petition to freeze a portion of Petitioner's *plan* funds, issuing a QDRO in April 2003, based on a two year old "counsel stipulation" of value, knowing that Petitioner's counsel refused to draft a QDRO and permitted that counsel to withdraw appearance to prejudice of Petitioner.

State courts inequitably denied Petitioner's motions to compel production of *plan* statements to support the values reported from "counsel stipulation" in 2001 to 2003 QDRO, of assets within Respondents' custody and control.

The state appellate courts permitted Bosick to supplement readily available evidence on the sale of real estate and inequitably denied Chajkowski's petition to

supplement the record with evidence within Bosick's custody and control of undisclosed assets, discovered after trial.

The issues pled in the Complaint were not denied by Respondents; and not correctly decided as a matter of law. Disclosure of *plan* information upon written request by *plan beneficiaries*; or by operation of law under the rules of civil procedure, is a statutory duty of Respondent(s)/*plan participant, law firm plans and plan trustees.* ERISA Civil enforcement preempts application of the *Rooker-Feldman* waiver of federal jurisdiction, a due process component of Petitioner/*plan beneficiary*'s claim and the implications of Respondent(s) 'duty' and failure to deny material allegations.

Fiduciary and Judicial Respondent(s) must be charged with actual and constructive knowledge that Chajkowski's 'equitable interest' in the assets of Bosick's *law firm plans* are subject to ERISA express disclosure provisions, intended by Congress to protect the Petitioner/*plan beneficiary*'s right to claim or secure her property interest. The courts' failure to enforce ERISA rights and responsibilities of the parties is a violation of the Fourteenth Amendment.

b) *Sua sponte* dismissed Petitioner's claim with prejudice, without any action from Respondents;

Respondents filed no denials of complaint allegations. The lower federal courts failed to construe factual allegations in favor of Petitioner, impermissible *bias* or reversible error.

The appeal court granted judicial respondents motion to be excused from filing a brief after the due date, which was not construed against respondents.

The district court failed to address Petitioner's undisputed record losses of $100,000.00 on Reconsideration, which constituted an 'arbitrary and capricious' abuse of discretion and a violation of the 14th Amendment, which the Appeal Court affirmed *sua sponte*, inconsistent with its own decisions and contrary to controlling authority in Exxon.

"Procedural due process rules are meant to protect persons not from deprivation, but from mistaken or unjustified deprivation of life, liberty or property." U.S.C.A. Const. Amend. 14. Carey v. Piphus, 435 U.S. 247 (1978) *citing* Boddie v. Connecticut, 401 U.S. 371, 375 (1971). "The right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable without proof of actual injury." Id.

The state and lower federal courts' failure to enforce ERISA occasioned unjust economic losses to Petitioner, impermissible *bias* or error. Appeal Court construction adverse to Petitioner, acknowledging material omissions of counsel in state courts yet applying *Rooker-Feldman* waiver of federal jurisdiction over Petitioner's suit for Declaratory Judgment effectively affirmed court error in adjudicating Petitioner's federal rights without due process, and constituted an inequitable exercise of appellate jurisdiction inconsistent with United States of America v. Moore, No. 03-2698, Middle District (3d Cir. 2004), where this appeal court chose not to apply *Rooker-Feldman* waiver of federal jurisdiction, holding that "fundamental unfairness" to a criminal defendant was supported by "plain error" evidence, FRE 404(b). In Moore, the Appeal Court invoked federal jurisdiction to reverse and remand a 'guns and arson' jury conviction at the sentencing stage, despite inaction on the part of defense counsel to object or trial court to intervene.

Here, allegations are undisputed that *alternate payee's* statutory rights were violated by *plan* respondents and by judicial respondents' failure to enforce statutory law, in violation of the 14th amendment. Therefore, a *sua sponte* denial of Rehearing *en banc* violated the 14th Amendment.

The lower courts failed to incorporate the standard for Dismissal, and controlling authority of this court in Exxon.

Exxon Mobil Corp. v. Saudi Basic Industries Corp. 125 S. Ct. 1517, 1521-22 (2005), is controlling authority, defining limits to *Rooker-Feldman* waiver of jurisdiction, as failure to enforce ERISA violated the 14th Amendment, as Petitioner's undisputed Complaint asserted and the federal record here demonstrates. The appeal court order/decision exercises jurisdictional waiver in *bias* or error here.

c) Failed to consider undisputed state court errors.

Declaratory Judgment is an equitable way to exercise civil jurisdiction to redress Petitioner's undisputed complaint allegations that Respondents' ERISA violations in state court constituted a violation of the 14th Amendment within the jurisdiction of the district court.

Two judges elected to recuse themselves from this divorce action after Bosick's motion for a new judge was granted and Respondent judge Max Baer went first to the civil division and later to the Pennsylvania Supreme Court.

The parties' counsel and Respondent/*Pennsylvania judges* have an ethical duty to recuse when there is a conflict. Without full disclosure, it is unclear why the litigation yielded such an unfair result. There are facial errors that the appellate courts failed to correct. For example, the $474,000 awarded in 2002 is not 60% of the total listed by 2001 trial evidence counsel stipulation; nor was $474,000 awarded by 2003 QDRO, qualified by the *plan*.

Petitioner/*alternate payee's* claim to compel *plan* statements and documents and to assess statutory penalties is reasonable, under the circumstances.

The lower federal court's *sua sponte* Orders dismissed Petitioner's undisputed, un-litigated claim that fiduciary violations and judicial failure to enforce ERISA, constituted a 14th amendment violation, within federal jurisdiction to remedy. Therefore, waiver of federal jurisdiction, here, is a Fourteenth Amendment violation.

d) Failed to entertain an appeal of Petitioner's claim.

State appellate courts failed to address Petitioner's claim that APL/child support and equitable distribution orders were entered without substantial evidence or contrary to the evidence. *Plan* assets were valued by counsel stipulation, which Petitioner did not fully comprehend. Two years later, the QDRO was entered at a loss without *plan* verification.

-April 4, 2001 *plan* values admitted and relied upon as trial evidence by "counsel stipulation"-never litigated.

-April 10, 2002 court order awarding $474,000.00 from *law firm plans* to Petitioner/*plan beneficiary*, awarding an unvalued "remainder" to Respondent(s)/*Self-employed plan participant*; the *law firm plans'* distribution unsupported by substantial evidence, as "Counsel Stipulation" was an unverified *hearsay* document, never litigated;

-August 2002, Petitioner's 1997-2002, Petitioner's divorce counsel from inception of litigation, refused to draft Petitioner's QDRO and withdrew her appearance, with the court's permission.

-April 2003 QDRO, Petitioner realizing a $100,000.00 unsubstantiated loss with the court granting Respondent's petition to 'freeze and control' a portion of Petitioner's share of funds; inequitably denying Petitioner's request for *plan* statements to verify *plan* values.

Petitioner's undisputed allegation that state appellate courts inequitably permitted Respondent to supplement the record and denied Petitioner to supplement the record with evidence of undisclosed assets was never given appeal.

The appeal court failed to do a plenary review of the record to determine whether the district court correctly

applied the law and abused its discretion by a *sua sponte* denial of petition for rehearing *en banc*.

The appeal court's treatment of Petitioner's ERISA claim is inconsistent with its decision in Moore, where the appeal court exercised jurisdiction after acknowledging a criminal defendant's ineffective counsel and the court's admission of FRE 404(b) plain error evidence. The procedural treatment of Petitioner's suit and failure to fully consider Exxon, raised by Petitioner's Reply Brief, is reversible *bias* or error.

IV. ELEVENTH AMENDMENT IMMUNITY DOES NOT APPLY TO JUDICIAL RESPONDENTS.

Under the Eleventh Amendment, states are granted sovereign immunity from suits by citizens of other states, foreign states, and their own state. U.S. Const. Amend XI. This immunity does not extend to government agents or officials acting in that capacity where a due process violation is alleged and where the state has consented. *See* Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003).

Petitioner/*alternate payee's* allegation, that her right to due process, violated by Respondents' failure to comply with or to enforce the law, including civil rules/ divorce code/ child support/ ERISA/ tax code statutes and the *Bifurcation* Order, undisputed by Respondents is a 14th Amendment violation, which warrant statutory sanctions. Therefore, the lower federal courts, by waiving jurisdiction over Petitioner's claim, consented to undisputed 14th Amendment violations.

The Pennsylvania Judges, Judicial Respondents in this matter, acted in their capacity as judges. They are not, in themselves, the "state" as protected by the Eleventh Amendment. Judicial Respondents denied Petitioner's due process rights by inequitably refusing to enforce full disclosure and consideration of Respondent Bosick's

retirement assets, to which Petitioner was entitled part. Finally, the Judicial Respondents did not raise Eleventh Amendment immunity, and the Federal District Court did not take it into consideration in its dismissal of the case, as the opinion accompanying the decision does not discuss the Eleventh Amendment as a reason for its dismissal. Thus, Judicial Respondents can be deemed to have consented. Therefore, the Eleventh Amendment does not apply to Judicial Respondents in the instant matter.

CONCLUSION

WHEREAS, this federal action involves *plan* assets that include, insurance, securities, trusts, real estate and corporate interests, where breach of fiduciary duty is undisputed, due process violations of statutory spousal rights at the dissolution of marriage under ERISA and *Bifurcation* Order and judicial failure to enforce the same are undisputed, this case involves important questions of constitutional and federal law. Further, this case addresses an inconsistent and inequitable application of this Honorable Court's decision in Exxon Mobil, and because this case implicates important questions regarding equal protection and due process under the Fourteenth Amendment, Petitioner respectfully requests that this Honorable Court Grant a Writ of Certiorari.

Respectfully submitted,

_____

Mary Ellen Chajkowski,
Petitioner *Pro Se*

September 22, 2005

(3)

FILED

05-419 SEP 29 2005

OFFICE OF THE CLERK

APPENDIX I
ORDERS AND OPINIONS

No. _____

In The

Supreme Court of the United States

MARY ELLEN CHAJKOWSKI *Pro se,*
Petitioner/alternate payee,

v.

JOSEPH J. BOSICK, *et al.*,
Respondent/self-employed plan participant and trustee,
Law firm employer- plan and plan trustees,
Pennsylvania judges.

On Petition for *Writ of Certiorari*
To the United States Court of Appeals for the Third Circuit

Petition for *Writ of Certiorari*

Mary Ellen Chajkowski *Pro se*
5510 Hobart Street
Pittsburgh, PA 15217
412-904-2222

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Statutes Conferring Jurisdiction

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. ... 28 U.S.C. § 1254 (1988).

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARY ELLEN CHAJKOWSKI, *Pro se*

Plaintiff **No. 04-cv-1582**

v.

JOSEPH BOSICK, *et al.*,

Defendants

Order of Court

AND NOW, this 20th day of October, 2004, for the reasons set forth in the accompanying *Memorandum* Opinion, IT IS HEREBY ORDERED that plaintiff's complaint and action is **DISMISSED** with prejudice. The Clerk of Court is directed to mark this case closed.

/s/Arthur J. Schwab,
United States District Judge

MEMORANDUM OPINION

Pro se plaintiff, Mary Ellen Chajkowski, filed a complaint against Joseph Bosick, and other members of his law firm, as well as the Chief Justice of the Supreme Court of Pennsylvania and certain other judges on the Superior Court of Pennsylvania. In her complaint, plaintiff broadly asserts that defendant Bosick and his law firm failed to make "timely disclosures" to plaintiff during her 1997 divorce action and filed an "incomplete inventory" of her ex-husband's 401k benefits. She also alleges that numerous state court judges at the trial and appellate levels arbitrarily and inequitably applied the law in favor of her ex-husband in divorce.

Although plaintiff alleges her complaint is based upon violations of ERISA and other "constitutional questions," the factual allegations amount to nothing more than a collateral attack on the state court judgments. This "Cause of Action" therefore raises insurmountable *Rooker-Feldman* hurdles. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). The *Rooker-Feldman* doctrine is a question of federal subject matter jurisdiction that this Court is not free to ignore. Gulla v. North Strabane Township, 146 F.3d 168, 170-71 (3d Cir. 1998). "Under the *Rooker-Feldman* doctrine, lower federal courts cannot entertain [federal] claims that have been previously adjudicated in the state court or that are inextricably intertwined with a state adjudication." FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996). Moreover, the state level decision need not be of its highest court, and the *Rooker-Feldman* doctrine applies equally to final decisions of lower state courts. Exxon Mobil Corp. v. Saudi Basic Industries Corp., 364 F.3d 102, 104 (3d Cir. 2004), citing Focus, 75 F.3d at 840.

Given the liberality with which federal courts construe *pro se* complaints, this Court would ordinarily give plaintiff an opportunity to amend her complaint or to show cause why this action should not be dismissed for want of subject matter jurisdiction. However, plaintiff's affirmative averments demonstrate that, even if her complaint could be read to sustain a federal question or diversity of citizenship jurisdiction, her cause of action is a "spin-off" of a state court action, that it suffers a fatal *Rooker-Feldman* defect, and that it must, therefore be dismissed with prejudice.

An appropriate order will be entered.

/s/Arthur J. Schwab,
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARY ELLEN CHAJKOWSKI ***Pro se,***

Plaintiff, **No. 04-cv-1582**

v.

JOSEPH BOSICK, ***et al,***

Defendants.

ORDER

AND NOW, this 2nd day of November, 2004, IT IS HEREBY ORDERED that plaintiff's request for Reconsideration (doc. no. 15) is DENIED.

/s/ Arthur J. Schwab
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4449

MARY ELLEN CHAJKOWSKI,
Appellant,

v.

JOSEPH J. BOSICK, Individually; PIETRAGALLO, BOSICK & GORDON, Salary Reduction Profit Sharing Plan; WILLIAM A. PIETRAGALLO, JR., Trustee of the Plan; MARK GORDON, Trustee of the Plan; MAX BAER, Justice of the Pennsylvania Supreme Court; KIMBERLY EATON, Judge of the Court of Common Pleas of Allegheny County; PATRICK R. TAMILA; KATE FORD ELLIOTT, Judge of the Supreme Court of Pennsylvania; CORREALE STEVENS, Judge of the Superior Court of Pennsylvania; JOAN ORIE MELVIN, Judge of the Superior Court of Pennsylvania; JAMES R. CAVANAUGH, Judge of the Superior Court of Pennsylvania.

ORDER

March 3, 2005

Sloviter, Authoring Judge, and Nygaard, Circuit Judges

The foregoing motion by the Judicial Appellees to be excused from filing a brief is granted without prejudice to any decision by the merits panel to request that the Judicial Appellees file a brief.[1]

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[1] Appeal Court Order issued after Judicial Appellee Brief was due in response to the 12/20/04 Briefing Notice issued to the parties.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 04-4449

MARY ELLEN CHAJKOWSKI, Appellant,
v.

JOSEPH J. BOSICK, Individually; PIETRAGALLO, BOSICK & GORDON, Salary Reduction Profit Sharing Plan; WILLIAM A. PIETRAGALLO, JR., Trustee of the Plan; MARK GORDON, Trustee of the Plan; MAX BAER, Justice of the Pennsylvania Supreme Court; KIMBERLY EATON, Judge of the Court of Common Pleas of Allegheny County; PATRICK R. TAMILA; KATE FORD ELLIOTT, Judge of the Supreme Court of Pennsylvania; CORREALE STEVENS, Judge of the Superior Court of Pennsylvania; JOAN ORIE MELVIN, Judge of the Superior Court of Pennsylvania; JAMES R. CAVANAUGH, Judge of the Superior Court of Pennsylvania.

On appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 04-cv-01582)
District Judge: Honorable Arthur Schwab

JUDGMENT Dated June 6, 2000

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania. On consideration whereof, it is now hereby ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered on November 2, 2004 be, and the same is, hereby affirmed. Costs taxed against appellant. All of the above in accordance with the Opinion of this Court. ATTEST: /s/ Marcia M. Waldron, Clerk

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4449

MARY ELLEN CHAJKOWSKI, Appellant,

v.

JOSEPH J. BOSICK, Individually; PIETRAGALLO, BOSICK & GORDON, Salary Reduction Profit Sharing Plan; WILLIAM A. PIETRAGALLO, JR., Trustee of the Plan; MARK GORDON, Trustee of the Plan; MAX BAER, Justice of the Pennsylvania Supreme Court; KIMBERLY EATON, Judge of the Court of Common Pleas of Allegheny County; PATRICK R. TAMILA; KATE FORD ELLIOTT, Judge of the Supreme Court of Pennsylvania; CORREALE STEVENS, Judge of the Superior Court of Pennsylvania; JOAN ORIE MELVIN, Judge of the Superior Court of Pennsylvania; JAMES R. CAVANAUGH, Judge of the Superior Court of Pennsylvania.

On appeal from the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 04-cv-01582)
District Judge: Honorable Arthur Schwab

Submitted Under Third Circuit LAR 34.1(a)-June 6, 2005
Before:
SLOVITER, BARRY and FISHER, Circuit Judges.
(Filed June 6, 2005)

OPINION

PER CURIAM

Appellant, Mary Ellen Chajkowski, appeals from the District Court's order dismissing her complaint for lack of subject matter jurisdiction and its subsequent order denying her motion for reconsideration. We have jurisdiction to review the final decision of the District Court under 28 U.S.C. § 1291. We exercise plenary review of a dismissal for lack of subject matter jurisdiction, *see U.S. ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 331 (3d Cir.2005), and review the denial of a motion for reconsideration for an abuse of discretion. *See Le v. Univ. of Pennsylvania.*, 321 F.3d 403, 405-06 (3d Cir.2003). For essentially the reasons given by the District Court, we will affirm.

In October 2004, Chajkowski brought a civil action in the United States District Court for the Western District of Pennsylvania purportedly raising "constitutional questions" and asserting ERISA claims against ex-husband Bosick, Bosick's law firm, trustees of the firm's Salary Reduction Profit Sharing Plan, and numerous judges of the Superior and Supreme Courts of Pennsylvania as well as the Court of Common Pleas of Allegheny County. Basically, Chajkowski alleged that the state courts erred in accepting the values of her ex-husband's ERISA assets--values that had been stipulated to by her attorney--and in using those values to render (and uphold on appeal) an equitable distribution order of the marital estate, and in failing to timely enforce its own "Bifurcation Order." Chajkowski sought declaratory and injunctive relief, as well as monetary damages.

In an order entered on October 21, 2004, the District Court concluded that the factual allegations in Chajkowski's

complaint amounted to nothing more than a collateral attack on the state court judgements rendered in connection with her divorce proceedings, and that dismissal of the complaint on the basis of the *Rooker-Feldman* doctrine was required. [FN1] While recognizing that a *pro se* plaintiff would ordinarily be afforded an opportunity to amend the complaint or show cause why the action should not be dismissed for lack of jurisdiction, the District Court determined that such action would be futile in the instant case given the "fatal *Rooker-Feldman* defect." The District Court likewise concluded that Chajkowski failed to demonstrate that reconsideration of its dismissal decision was warranted, and an order was thus entered on November 2, 2004, denying her motion filed pursuant to Fed.R.Civ.P. 59(e). This timely appeal followed.

> FN1. The *Rooker-Feldman* doctrine embodies the principles set forth by the Supreme Court in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983).

Under the *Rooker-Feldman* doctrine, lower federal courts cannot entertain constitutional claims that are inextricably intertwined with a state adjudication. *See FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 840 (3d Cir.1996). A federal claim is inextricably intertwined with a prior state adjudication if:

the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. In other words, *Rooker-Feldman* precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling.... If the relief requested in the federal action requires determining that the state court's decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the District Court has no subject matter jurisdiction to hear the suit.